No. 13047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, and THOMAS B. MACK,

Appellees.

Brief of Appellant Standard Accident Insurance Company.

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Brief of Appellant Standard Accident Insurance Company.

Basis of Jurisdiction.

Pursuant to Rule 20, subdivision (b) of this Court, this appellant, Standard Accident Insurance Company of Detroit, Michigan, hereafter for convenience referred to as Standard, presents its statement of the pleadings and

facts disclosing the basis upon which it is contended that the trial court had jurisdiction and that this court has jurisdiction to review the judgment.

Vivian Winget and Thomas B. Mack recovered judgments against one Billie Ray Towry in the Superior Court of the State of California, County of Ventura, for injuries arising out of an automobile accident.

Upon non-payment of her judgment Vivian Winget, herein for convenience called Winget, brought a supplemental action to enforce collection of said judgment from Standard upon allegations that the judgment debtor Towry was covered at the time of the accident by a public liability automobile insurance policy issued by Standard. Winget also named as a defendant in said action the said Thomas B. Mack and prayed that Standard be enjoined from making any payment on account of Mack's judgment until final settlement of the Winget claim.

Upon petition of Standard, said action pending in the State Court was removed to the United States District Court upon the grounds set forth in said motion that Winget and Standard were citizens of different states; that the amount in controversy between them, exclusive of interest and costs exceed $3,000.00; and that the claim of Winget against Mack was one which might under the law be heard and determined by the said United States District Court. [T. R. pp. 3-6; 28 U. S. C., Secs. 1332 and 1441 (c).]

Statement of the Case.

Appellant Standard presents the question whether it may be held liable by a third person holding a judgment against its insured where the insured has made false statements to Standard concerning circumstances relating to an automobile accident. Do such false statements violate the insured's duty to cooperate?

This question is herein presented in the following manner: Winget holds an unsatisfied judgment against one Billie Ray Towry for injuries resulting from an automobile accident on January 26, 1949, when Winget was a passenger in Towry's automobile. [T. R. p. 30.]

Standard, in this action presented the defense that the insured Towry failed to cooperate with Standard as required by conditions of his policy. [T. R. p. 17.]

Standard moved the trial court for an order directing the jury to find in favor of Standard and after the trial court's refusal and the following verdict of the jury in favor of Winget, moved said trial court for judgment, notwithstanding said verdict. Both of these motions were denied. [T. R. pp. 222-224 and 264.]

Appellant Standard insists that the admittedly false statements made by its assured prior to the trial of the suit in the State Court were prejudicial to Standard and constituted violations of the cooperation clause which was a condition of its policy of insurance so as to constitute a defense to Standard as a matter of law. This cooperation clause is printed in his policy as Condition No. 8, which policy is in evidence as Winget's Exhibit 4. While the policy has not been printed in the Transcript, it was made a part of the record.

Specification of Errors.

Pursuant to Rule 20, Subdivision (2) (d), Appellant Standard specifies as errors committed by the trial court the following:

I.

In view of the uncontradicted testimony of the insured that he had made false statements of facts relating to the accident, the court erred in its denial of Standard's motion for a directed verdict. [T. R. pp. 222-224.]

II.

In view of the fact that there was no conflict in the testimony that the assured made such false statements, the court erred in refusing to grant Standard's motion for judgment, notwithstanding the verdict. [T. R. pp. 243-257, 264.]

III.

In permitting testimony as to what reasons the assured gave to his personal attorney for changing his deposition. [T. R. pp. 99 and 100.]

The substance of the evidence admitted and the grounds urged at the trial for the exclusion of the same are contained in the following excerpt from the Transcript of Record. [T. R. pp. 99 to 101.]

> "Q. (By Mr. Heily): At the time Mr. Towry made the changes in the deposition, did he discuss with you the reasons for making the changes? A. Yes, he did.
>
> Q. What did he say?
>
> Mr. Wynn: Well, I think I will object to that as hearsay, not made in the presence of any persons representing the defendant.

The Court. I think I will overrule the objection.

Mr. Wynn: Very well.

The Witness: We had a lengthy discussion of this, Mr. Heily. It lasted probably two hours. It was a year ago and I don't remember everything that was said, but I do recall asking him to tell me in detail everything that happened on the day of this accident, which he did. I asked him in particular about drinking, whether he had had anything to drink, and if so, what, and he told me he had had a small quantity of beer during the day and nothing else to drink. I asked him what he had told the insurance company and why they were attempting to withdraw from the case, if he knew.

He explained to me in his deposition he had indicated he had not had any intoxicating liquor to drink.

I was concerned about that and asked him why, what the circumstances were when the deposition was given.

He stated to me that he had not had any opportunity to talk with counsel for the insurance company prior to the giving of the deposition, that he met his attorney, went into Mr. Hollingsworth's office, and they immediately started asking him questions, and when they came to the question of intoxicating liquor, he wasn't sure in his own mind whether beer was within the category of intoxicating liquor; that he wanted to protect the insurance company as much as he could, and he just said no, he hadn't had any intoxicating liquor to drink.

I then explained to him I thought it of the utmost importance that he correct his deposition until it stated the actual and absolute truth, I thought that was his duty, and he agreed that he would do so.

Then I went through the deposition with him in detail, question by question, and asked him exactly

what the facts were, and when he came to any answer that he considered not wholly accurate, I had him write in his own handwriting the correction on the face of the deposition.

In addition to that, I had quite a lengthy discussion with him about this technical point, as to whether the insurance company lawyers could withdraw from his defense. I don't know whether you want me to go into that."

IV.

In refusing admission in evidence of Standard's Exhibit "D" for identification [T. R. p. 124] and in rejecting offer of proof of same matter. [T. R. pp. 187-188.]

The substance of this offered Exhibit and the evidence submitted by offer of proof was a statement made on a form provided by Standard with typewritten additions, all to the effect that the assured "had not been drinking." (This offered Exhibit is included in the record on appeal but has not been printed in the Transcript.)

The grounds urged at the trial in objection to the admission of said evidence are quoted as follows [T. R. pp. 123-124]:

"Q. Now, Mr. Towry, where were you when this statement was presented to you to sign? A. I was in the hospital, Lying-in Hospital in Oxnard.

Q. What was your condition of health? A. I don't remember signing it. This guy brought it in from the Automobile Club, and I recognized him. That is when I signed the document.

Q. Were you in the hospital for what injury? A. I had a cut on my eye—

Q. The accident was January 26? A. January 26.

Q. And this was the 28th when he came in to see you? A. It was.

Q. At that time, did he hand you the document for reading? A. No, I did not read it.

Q. You did not read it? A. He said it has to be in Sacramento within 10 days after the accident, and he was from the Automobile Club, so he filled it out and I signed it.

Q. He filled it out and you signed it without reading it? A. I did not read it.

The Court: May I ask a question? Was it read to you?

The Witness: No, sir.

Q. (By Mr. Heily): Do you recall anything that was stated in it, or have you ever read it? A. No, sir, I have never read it.

Q. You don't know anything that is in it? A. I don't know.

Mr. Heily: I will object to the admission, your Honor, under the circumstances. No proper foundation.

Mr. Wynn: The foundation is there. The person has signed the document.

The Court: Supposing he says he has never read it, it was not read to him, he was in the hospital and somebody came in and presented it to him and asked him to sign it? Do you think he is bound by the contents of the document?

Mr. Wynn: I think he is bound by it. He is a man over the age of 21 years.

The Court: I will sustain the objection."

And further [T. R. pp. 167-170]:

"By Mr. Wynn: Q. And you had given such statement to the Highway Patrol men prior to the

date of January 28, 1949, on which the report of accident signed by you and marked Defendant's Exhibit D for identification was signed? A. Yes, I believe so.

Q. Now, I will ask you to read on the reverse side of Defendant's Exhibit D for identification—

Mr. Heily: I am going to object to any further questions on this line as improper cross-examination.

The Court: Counsel has the right to ask the question. You may object to it being answered.

Mr. Heily: I am sorry.

Q. (By Mr. Wynn): —the typewritten information on the reverse side of Defendant's Exhibit D for identification as to the version of the accident given thereon, and ask you whether that is the version you gave to the California Highway Patrol officers.

Mr. Heily: I object as improper examination.

The Court: Overruled. You can answer yes or no.

The Witness: I don't recall what I told the Highway Patrol that night. I just remember seeing them there. I can't say it was over two hours after the accident. I don't know exactly when it was.

Q. You have read, however, from the exhibit now before you the statement as to the occurrences of the accident, have you? A. Yes.

Q. Do you agree with that version of the accident as stated on the exhibit before you?

Mr. Heily: Object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. Wynn: May I be heard, your Honor? Now if I may be heard just a moment, we are confronted with an action in which the witness called by us is

a party interested in the outcome of the action and definitely interested, and he is a party to the contract. Now, I have called him as my witness by virtue of the fact that under the rulings of the court, the burden is upon me to prove our affirmative defense. That defense is based on what this witness will admit upon examination on the witness stand. I think that he is a party to the action in effect. He is a party for whose interest the action is maintained, in the first place, and, secondly, I believe I am entitled upon it appearing in evidence that the person in an adverse witness in effect, to cross-examine him, although called by me.

The Court: Let me ask you a question. Supposing that this witness had made a statement on which you could rely for the avoidance of your policy to a stranger, not to the insurance company, not to representatives of the insurance company, but to a stranger. Do you think that the insurance company can rely for the avoidance of a policy on a misstatement made to someone else other than the insurance company?

Mr. Wynn: Definitely I do.

The Court: Have you any authorities?

Mr. Wynn: If he made a misstatement to a person entitled to examine him upon it and that misstatement of fact is incorporated—

The Court: Does a highway patrolman have the right, as a matter of law, to examine the—he has the right to ask the question. If the witness doesn't answer, he has no way of forcing the witness to answer. It is purely voluntary. Does he have the right as a matter of law? The Highway Department wasn't representing the insurance company. If they were representing anybody, they were representing

the people of the State of California, including this witness.

Mr. Wynn: This is just whether your Honor should declare certain things immaterial after the accident.

The Court: If you have got an authority that says you can rely upon a misstatement made to a stranger, someone that is not connected with the insurance company, I will read it.

Mr. Wynn: I submit the fact that the document containing information passed to the third person was transmitted to the insurance company.

The Court: I am going to have to hold that the representation must be made to the insurance company, and the insurance company cannot rely upon a representation made to a stranger. (156.)

Mr. Wynn: Not wishing, of course, to inquire against the court's ruling, do I understand I may not inquire of this witness as to whether or not he did state he had had nothing intoxicating to drink upon being examined by anyone shortly after the accident?

The Court: Unless you can show this was a misrepresentation made to the insurance company or its legal representative.

Mr. Wynn: I offer to prove by the witness on the stand that—

Mr. Heily: If there is going to be an offer of proof, I suggest it be made out of the hearing of the jury.

The Court: Yes, I think your offer should be made outside the presence of the jury. You can wait until the 3:00 o'clock recess. Then I will allow you to make your offer of proof."

And further [T. R. pp. 187-188]:

"Mr. Wynn: I now offer to prove by the witness Billy Ray Towry that subsequent to the date of the occurrence of the accident, on or about January 26, 1949, in Ventura County and prior to the date of January 28, 1949, the witness gave a report to representatives of the California Highway Patrol, in which the witness reported that he had not been drinking.

I think that is the limit of what I could attempt to prove by this witness. The tie-in would be, of course, that the information came to the defendant, but I offer to prove by the witness those facts.

Mr. Heily: In respect to that, first of all, the witness has already testified he doesn't remember what he told the Highway Patrol.

Secondly, it is immaterial, incompetent, irrelevant, no proper foundation, not the best evidence. It is an attempt to impeach his own witness.

The Court: Well, now, your insurance policy provides only, if I can recall the subdivision correctly, that the insured shall cooperate with the company. It doesn't say he shall cooperate with anybody else. It doesn't say he shall cooperate with the Motor Vehicle Department. It doesn't say he should cooperate with the police officers. It doesn't say, even, that he shall cooperate with attorneys. It says cooperate with the company. I think you are bound by that provision. I don't think you can come in and say we can avoid the policy because the witness did not cooperate with a stranger to the action. So I am going to deny your offer of proof.

Mr. Wynn: Very well."

ARGUMENT.

I.

False Statement by an Assured Under an Automobile Public Liability Policy Constitutes a Breach of the Cooperation Clause of Said Policy as a Matter of Law. (Referring to Specifications of Errors I and II.)

The assured and judgment debtor in the State Court, Billie R. Towry, admittedly testified falsely concerning consumption of alcoholic liquors, including beer, in his deposition given in the State Court action. [T. R. pp. 160-164.]

The trial court excluded a further statement made in Standard's Exhibit D for identification (included in record on appeal but omitted from Transcript of Record) to the effect that insured had not been drinking. This order of the court has been specified as an error herein. (Spec. Error IV.)

In addition, he gave a false statement over his signature which was submitted to appellant Standard on July 11, 1949, again stating that no one in his party had any intoxicating liquor to drink. [T. R. pp. 110-112.]

Under the decisions of the District Court of Appeal and the Supreme Court of the State of California, and under the decision of this learned Court hereafter cited, Standard urges that it was entitled to a judgment under the facts so revealed.

We respectfully refer to the following decisions:

(1) *Valladao v. Fireman's Fund Ind. Co.,* a Corporation (13 Cal. 2d 322, 89 P. 2d 643). Decided April, 1939.

(2) *Margellini v. Pacific Automobile Ins. Co.,* a Corporation (33 Cal. App. 2d 93, 91 P. 2d 136). Decided May, 1939.

(3) *Wright v. Farmers Automobile Inter-Insurance Exchange* (39 Cal. App. 2d 70, 102 P. 2d 352). Decided May, 1940.

(4) *Home Indemnity Co. of New York v. Standard Accident Ins. Co. of Detroit* (167 F. 2d 919, C. C. A. 9th). Decided May 11, 1948.

(5) *Salonen v. Paanenen, et al.* (Mass., 1947), 71 N. E. 2d 227.

In the *Valladao* case referred to above it appeared that the owner of the insured automobile made a statement to the insurer shortly after the accident to the effect that he had not been driving the car at that time. His insurance company denied liability upon the ground that he had failed to cooperate as required by the terms of the policy [*ibid* p. 328]. The Supreme Court of California held that while what constitutes cooperation is ordinarily a question of fact, the question in that case became one of law because the insured knowingly and wilfully made a false statement concerning material facts [*ibid* pp. 330 and 331].

In the case of *Margellini v. Pacific Automobile Ins. Co. (supra),* the named insured under the policy failed to make any report whatsoever concerning the accident. In that case the California District Court of Appeal for the

Fourth Appellate District, refused judgment in favor of the injured third party holding that the failure of the assured driver to make a disclosure of information concerning the accident was a breach of the cooperation clause and that as a matter of law it was presumed that prejudice resulted to the insurer from such breach.

The case referred to above as No. 3, *Wright v. Farmers Automobile Inter-Insurance Exchange,* was also decided by the Fourth Appellate District of the California District Court of Appeal. In that case it appeared that the insured changed his version of the accident from that contained in his verified answer and the Appellate Court again held that this was a violation of the cooperation clause of the policy. In this case the Appellate Court reversed the judgment entered in favor of the injured plaintiff after the trial court had denied the insurer's motion for judgment notwithstanding the verdict.

Next we refer to the decision of this learned court in the case of *Home Indemnity Co. v. Standard Accident Ins. Co. of Detroit (supra).* In the *Home* case it appeared that the assured, George White, gave several versions of the accident to his insurance company and in statements to attorneys. We respectfully quote the following language of this learned court as expressed by Honorable Circuit Judge Garrecht on page 924 of the Opinion:

> "Truthfulness seems to be the keystone of the cooperation arch. The insured must tell his insurer the complete truth concerning the accident, *and he must stick to the truthful version throughout the proceedings.* He must not embarrass or cripple his insurer in its defense against a civil suit arising out of the accident by switching from one version to

another. He must not blow hot and cold to suit his personal convenience." (Italics supplied by Court.)

Judge Garrecht quotes with approval language of the California Supreme Court in the *Valladao* case *(supra)* and also quites from *Buffalo v. U. S. F. & G. Co.* (10th Circuit), 84 F. 2d 883 at 885, as follows:

> "The Company is entitled however to an honest statement by the insured of the pertinent circumstances concerning the accident as he remembers them. Lacking that the company is deprived of the opportunity to negotiate a settlement or to depend upon the solid grounds of fact. *Nothing is more dangerous than a client who deliberately falsifies the facts."* (Italics supplied by Court.)

It should be pointed out that in the *Home Indemnity Company* case now under discussion, as well as in the *Valladao, Margellini* and *Wright* cases determined in the Courts of California, the same conclusion was reached in each case: Where an assured has made misrepresentations or false statements concerning any matter involving the accident, such misrepresentations or false statements void his insurance policy as a matter of law and neither the Court nor a jury as a trier of fact can speculate as to what the outcome might have been or as to what action the insurance company might have taken had such misrepresentations or false statements not been made. (In this connection see *Home Indemnity v. Standard Accident Ins. Co. of Detroit (supra),* pp. 928 and 929.)

In all of the decisions cited by us, it appears, as in the case at bar, that the assured admittedly made conflicting statements. In the case at bar the assured stated in a written report given to appellant Standard that none of

the parties involved had used any intoxicating liquor, and later in his sworn deposition stated expressly that he had had nothing to drink, including, specifically, beer. Whether or not these statements were in fact false he subsequently recanted and admitted that on the day of the accident he had been drinking beer.

Presumably the jury in the instant case concluded that these statements by the assured were immaterial. We point out that this was the finding made by the learned District Judge, Honorable J. F. T. O'Connor, in the *Home Indemnity* case cited above, but as held by this Court the conclusion as to materiality is not one of fact but is one of law.

The fifth case to which we respectfully direct this Court's attention is *Salonen v. Paanenen* (*supra*). There again the insured made conflicting statements as to the manner in which the accident occurred. Judgment in favor of the insurance company upon the suit of the injured party was affirmed upon the ground that the insured had failed to cooperate with the company in making such conflicting reports concerning the accident.

In each of the cases cited above the insurance company contended that there was a failure to cooperate in that its insured either failed to make any statement as in the *Margellini* case or made conflicting statements concerning the happening of the accident, or concerning facts incidental thereto. For example, in the *Valladao* case the insured first claimed that he was not driving the vehicle at the time of the accident. This fact however would not have affected the insurance coverage and the man who was driving the vehicle would have been entitled to coverage. On appeal before the California Supreme Court it was urged that under such circumstances the insurance

company could not possibly have been prejudiced since if it knew the facts at the time of trial it would have had no other defense. The Supreme Court however, as has each court represented in the decisions mentioned above, held that where an assured makes a wilfully false statement of facts involving the accident this amounts to a failure to cooperate with his insurance company as a matter of law and constitutes a complete defense in favor of the insurance company.

II.

The Court Erred in Permitting Towry to Explain Changes in His Deposition.

The witness, Willard, who was the personal attorney for Towry, was permitted, over objection by counsel for Standard on the ground that such testimony was hearsay, to testify that out of the presence or hearing of Standard or of its representatives, he, Willard, had a conference with his client Towry wherein Towry expressed personal opinions and beliefs and advanced reasons for giving the testimony he had originally given in his deposition. [T. R. pp. 99-101.]

This testimony was clearly hearsay and was objected to by Standard on such ground. [T. R. p. 99.]

Whatever may have been the personal motives or desires of Towry, the facts are that he did make conflicting and contradictory statements. As observed by this court in the *Home Indemnity* case, neither the court nor jury is permitted to speculate as to what the outcome might have been had he not done so.

III.

The Court Erred in Excluding Standard's Exhibit D and Its Offer of Proof of a Statement Contained Therein.

As previously noted, this Exhibit D which was offered by Standard, has not been included in the printed Transcript, although it will be found in the record certified to this court.

The only pertinent portion of this Exhibit is the statement of insured, which will be found on the reverse side thereof, "I had not been drinking."

Admission of this document was refused by the court on the ground that the statement had been first given to California State Highway Patrolmen, and was passed on by them to Standard. The trial court held that Standard could not rely on such statement made to third persons. [T. R. pp. 167-170.]

Later, during the trial, Standard offered to prove by the witness Towry that Towry did give a report to representatives of the California Highway Patrol in which he stated that he had not been drinking. Such offer of proof was likewise refused on the ground that a false statement made by an assured to attorneys or police officers would not tend to show non-cooperation with the insurer. [T. R. pp. 187-188.]

We submit that such evidence was vital and pertinent to the issue, whether insured had made conflicting statements concerning material facts. If the assured made a false statement concerning any such fact to any one he could have been confronted with such statement before a court or jury.

If the insured had spoken the truth at the earliest possible moment in his said Accident Report, the insurer would have had an opportunity to conduct settlement negotiations prior to filing of suits.

On the authorities cited at length in Section I of this argument, Standard submits that it should have been permitted to prove that the statement referred to was made by the insured and was relied on by Standard, just as it relied on the later written statement admitted in evidence as Defendant's Exhibit E and the testimony given by assured in his deposition in the State Court action before his alleged correction thereof, which deposition was admitted in evidence as Defendant's Exhibit A.

Conclusion.

On the occasion of every contact between the insured Towry and any representative of his insurance company, up until the very eve of trial, Towry asserted that he had not been drinking on the day of the accident. Then when confronted by statements to the contrray made by other members of his party, he changed his story. The insurer Standard, was thus placed in a position where it could expect that its insured might be charged with perjury or at the least, completely discredited before a jury.

This we assert is a material breach which voids coverage of the policy.

Respectfully submitted,

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